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No. 92-1874

In the
Supreme Court of the United States
October Term, 1992

SANDY RIVER NURSING CARE CENTER, et al.,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

Siegel, Brill, Greupner & Duffy, P.A.
K. Craig Wildfang
Counsel of Record
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-7131

Opperman, Heins & Paquin
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue South
Minneapolis, Minnesota 55401
(612) 339-6900

Curtis, Thaxter, Stevens, Broder & Micoleau
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, Maine 04112
(207) 775-2361

McTeague, Higbee, Libner, MacAdam, Case & Watson
Patrick N. McTeague
Four Union Park
Post Office Box 5000
Topsham, Maine 04086-5000
(207) 725-5581

Barnet D. Skolnik
One Canal Plaza
Post Office Box 7320
Portland, Maine 04112
(207) 775-2361

1993 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

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The Joint Brief in Opposition ("Opp.") filed by the Respondent insurers, and the *Amicus Curiae* brief of the State of Maine ("*Amicus*") urging the Court to grant the instant petition, amply illustrate the reasons certiorari should be granted. While continuing to mischaracterize Petitioners' claims in the hope of retaining the mantle of state action immunity erroneously provided to them by the court of appeals, the Opposition provides scant grounds for confidence that the court of appeals' decision was correct; that its harmful effects on antitrust enforcement can be narrowly confined; or that the conflict between the First Circuit's expansive

treatment of the "clear articulation" prong of *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and the Ninth and Tenth Circuits' more rigorous two-part test will not result in uncertainty in the law and hamper the State's antitrust enforcement. *See Amicus* at 4.

Indeed, the State of Maine as *Amicus* persuasively argues that the decision of the court of appeals is objectively incorrect since under Maine's insurance regulatory scheme "competition remains the rule," *Amicus* at 11, and therefore the decision below "is in direct conflict with this Court's holding in *Ticor*." *Id.* at 8. Perhaps more important, the State of Maine properly fears that the "error into which the court of appeals has fallen carries broad implications for future litigation, state regulation and the balance of federalism." *Id.* at 13.

1. Respondents desire to, but cannot, distinguish *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990). Respondents' unfounded assertion that the courts below held that "*Trial Lawyers* is a fundamentally different case from this one," Opp. at 6, is plainly contradicted by the court of appeals' finding that *Trial Lawyers* was "a case closely analogous to the one before us." A-11.[1] Moreover, Respondents' assertion that *Trial Lawyers* is inapplicable, while a "coerced legislation" theory was "addressed and rejected" in *City of Columbia v. Omni Outdoor Advertising, Inc.*, ____U.S.____, 111 S. Ct. 1344 (1991) and *Hoover v. Ronwin*, 466 U.S. 558 (1984), is fallacious. Neither *Omni* nor *Hoover*, and indeed no decision of this Court other than *Trial Lawyers*, considered the proper antitrust treatment of a *per se* unlawful economic boycott utilized as a tool to coerce favorable treatment by the

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[1]References to "A____" are to the Appendix to the Petition. References to "Jt. App." are to the Joint Appendix filed by the parties in the court of appeals.

government.[2] In *Trial Lawyers* this Court found that such a boycott was *per se* unlawful and not protected by the First Amendment. The equally important question presented here is whether the action of the government to end the boycott by capitulating to the boycotter's demands for an increase in price ceilings is, as a matter of law, a "superseding cause" which provides the boycotters with immunity from damage liability under §4 of the Clayton Act.[3] The Opposition fails to argue persuasively why this important question should not be answered by this Court.

2. Respondents also miss the mark when they argue that "*Omni* and *Hoover* are links in a fifty-year unbroken chain of cases uniformly holding that antitrust claims may not be premised on injury resulting from governmental action." Opp. at 6. Respondents' argument is indisputable, but inapposite. Thus, Respondents continue, as they have throughout this litigation, to mischaracterize Petitioners'

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[2]*Omni* involved a claim that campaign contributions and long-time friendship with city council members supported an allegation that the City "conspired" with a billboard company to exclude competition, and provided the basis for recognition of a "conspiracy exception" to the City's otherwise applicable state-action immunity. 111 S. Ct. at 1350-51. In *Hoover* the allegation was that a committee appointed by the Arizona Supreme Court to grade bar examinations had set a grading scale to restrict the number of new attorneys. 466 U.S. at 565.

[3]Respondents do not appear to dispute that the question is an important one; rather, they suggest that a question's undisputed importance is insufficient for purposes of certiorari. Opp. at 6. ("The best that [Petitioners] can do is to suggest that [the question] was not addressed in *Trial Lawyers* and that it is 'important.'"). However, the question presented to the Court in *Trial Lawyers* was granted certiorari notwithstanding the lack of conflict among the courts of appeals precisely because the question was important. 493 U.S. at 421.

claims and to base their defense upon the single critical -- but flawed -- premise that Petitioners have not claimed any "direct marketplace injury" resulting from Respondents' *per se* unlawful conduct. The premise is critical because, without it, *Omni* is inapplicable, *Trial Lawyers* is indistinguishable, and Respondents' claim to the mantle of state action immunity is revealed for the artful sham that it is. The premise is flawed because it misstates Petitioners' claims and misrepresents the facts.

The plaintiffs in *Omni* and *Hoover* were injured *solely* because of governmental regulation (*i.e.* the restrictions on billboards and attorneys). The regulations themselves directly limited plaintiffs' ability to compete. In the instant case, however, Petitioners have never alleged that the source of their injury was the action of the State of Maine in raising the price ceilings; rather, Petitioners allege the injury was caused by Respondents' *private* agreement to utilize uniformly only the maximum rates.[4] Here, while the State's raising of the maxima may have enabled Respondents' agreement to cause *greater* damage to Petitioners, the raising of the maxima did not, in and of itself, injure Petitioners at all. Rather, as Petitioners have always maintained, they have been injured "by reason of" Respondents' violations of the antitrust laws. Amended Complaint ¶55. (A-68).

3. There is no basis for Respondents' assertion that Petitioners' "claim of a 'conspiracy not to deviate' from joint rates . . . was not presented until appeal," and is therefore

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[4]As suggested in the Petition (at 18 n.12), if Respondents' view were correct, *any* private conspiracy to fix prices at government-set maxima would be immune from damage liability as involving "injury resulting from governmental action." Obviously, such an argument is untenable.

foreclosed. Opp. at 9-10.[5] Not only is this claim straightforwardly presented in Petitioners' Amended Complaint at ¶41(b) A42, 61-62,[6] the district court expressly addressed the allegation and disposed of it, albeit erroneously. A-34-35 (quoted in *Amicus* at 7). The Maine Attorney General also had no doubt that petitioners had alleged a "conspiracy not to deviate." *Amicus* at 6 ("Beyond their allegation of a boycott to coerce legislative action, plaintiffs further alleged that defendants entered a private agreement to maintain, and not deviate or discount from, the maximum rates . . . ."). In any event, the court of appeals quite properly

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[5]In making this argument, Respondents misrepresent the record below when they claim (Opp. at 9-10) that Petitioners "did not challenge" the affidavit of the former superintendent of insurance, "did not seek discovery under Rule 56(f)," and "submitted no contradictory evidence under Fed. R. Civ. P. 56(e)." In fact, Petitioners *did* challenge the affidavit, *see* Plaintiffs' Statement of Material Facts as to Which It Is Contended There Exists A Genuine Issue To Be Tried, ¶5 (Jt. App. at 665), *did* seek discovery under Rule 56(f), *see* Second Affidavit of Sidney St.F. Thaxter (Jt. App. at 614) as acknowledged in the district court's opinion (A-29 n.3), and *did* submit contradictory evidence under Fed. R. Civ. P. 56(e), *see* Affidavits of Sidney St.F. Thaxter and appended materials (Jt. App. 566) and K. Craig Wildfang and appended materials (Jt. App. 677).

[6]Petitioners alleged, *inter alia*, a price fixing agreement in Count I of their Amended Complaint, ¶¶38-44 (A-60-63), and specifically alleged that "defendants agreed to utilize uniform rates which were higher than those which would have prevailed in the absence of defendants' conspiracy," *id.* ¶41(b)(A-62), an allegation that gave Respondents more than adequate notice that Petitioners were alleging an agreement to fix prices at a uniform level. Moreover, at oral argument in the district court Petitioners' counsel specifically described the claim: "[Plaintiffs were injured by] the use of rates after November 20, 1987 *up to the new ceiling that was set . . . . [Plaintiffs] were injured by these private defendants in their private conspiracy charging up to the new ceiling . . . .*" (Jt. App. at 734)(emphasis added).

decided the issue on the merits. A-18-22.[7]

4. Respondents largely fail to respond to the arguments in the Petition (at 18-26) regarding the need for review of the court of appeals' erroneous application of the state action doctrine. Respondents make just three points; none is persuasive. First, Respondents suggest that the fact that "on five occasions in the last eight terms" the Court has considered state action issues is an indication that there is nothing left to be said by this Court with respect to state action. Opp. at 10. Petitioners submit that exactly the contrary is true: that this Court's frequent re-visitation of the state action doctrine is an indication of the "pervasive vexatiousness" of the question of the extent of that immunity and the lower courts' continuing need for guidance in this difficult and oft-litigated area.[8]

Second, Respondents' claim that the Court's decision in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), is dispositive of the issue in this case is erroneous for the reasons stated in the Petition at 24-25 and in the *Amicus* at 9-11. The Opposition fails to address the crucial distinction between *Southern Motor Carriers* and the instant case. In *Southern Motor Carriers* the Court immunized the joint preparation and submission of rate

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[7]By so doing the court was not only consistent with the strong policy favoring deciding issues on the merits rather than on technicalities, the court also properly, albeit implicitly, agreed with this Court's recent reaffirmation of the "liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ____U.S.____, 113 S. Ct. 1160, 1163 (1993). Thus, this issue is properly before this Court on petition for certiorari.

[8]*See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶212.6 (Supp. 1992).

proposals (the action challenged therein by the government) because *that activity* was clearly expressed as state policy and actively supervised by the states. In contrast, here the court of appeals has immunized a private agreement to charge uniformly maximum prices when the state has only permitted and supervised a separate activity, *i.e.* the joint preparation and filing of proposed maximum rates.

Finally, Respondents assert, but do not demonstrate, the absence of the conflict between the First Circuit and the Ninth and Tenth Circuits on the "clear articulation" prong of *Midcal*. Opp. at 13-16.[9] Incredibly, Respondents claim no conflict exists because in four of the five cited conflicting cases the *result* was a finding of no state action immunity. Opp. at 13-14. However, the existence of conflict among the courts of appeals is not determined by the outcomes of individual cases (since, obviously, facts may vary) but rather by examining the analysis, methodology and standards employed by the courts of appeals. On that score there can be no doubt that the Ninth and Tenth Circuits have employed a rigorous two-step test consistent with this Court's principles set forth in *Federal Trade Commission v. Ticor Title Insurance Co.*, ____U.S.____, 112 S. Ct. 2169 (1992), while the First Circuit has utilized an inconsistent "implicitly condoned" standard.

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[9]Respondents suggest that Petitioners' failure to cite *Brown v. Ticor Title Insurance*, 982 F.2d 386 (9th Cir. 1992) to the court of appeals indicates that the conflict between the First and Ninth Circuits represents an "afterthought" by Petitioners. Opp. at 14 n.7. *Brown*, however, was decided on December 28, 1992, some three weeks *after* the argument in the court of appeals in the instant case. Similarly, Respondents' suggestion that the lower courts were unaware of Me. Rev. Stat. Ann. tit. 24-A, §2301 (West 1988) is incorrect; that statutory section appeared on the very first page of the statutes contained in the Regulatory Appendix submitted to the district court. *See* Jt. App. at 288.

5. Respondents' glaring failure to address at all the fact that 32 states have statutes favoring price competition identical to Me. Rev. Stat. Ann. tit. 24-1, §2301 (West 1988) is noteworthy. *See* Pet. at 5 n.4.[10] The Ninth Circuit and the First Circuit have reached diametrically opposed conclusions as to the existence of state action immunity in states with such statutes. Of the 32 states, 5 are in the First Circuit, 5 are in the Ninth Circuit, and 22 are in other circuits. State regulators in those states, and indeed insurers who do business in those states, now may be in doubt about whether such statutes are consistent or inconsistent with claims of state action immunity by insurers. This doubt will greatly diminish the regulatory choices available to states who may fear an unintended grant of state action immunity. *See Ticor*, 112 S. Ct. at 2178. Review in this case will help ease such doubts and will promote certainty and uniformity in the law.

6. The two questions presented by the instant petition raise issues of enormous importance that should be resolved by this Court. Those questions, however, present a single, fundamental, and critical policy question: Are the

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[10]Respondents misquote this statute. Opp. at 15. Counsel for Respondents have indicated that they intend to correct the quotation. The statute provides:

> Nothing in this chapter is intended to prohibit or discourage reasonable competition, or to prohibit or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates . . . .

Me. Rev. Stat. Ann. tit. 24-A, §2301 (1988).

federal antitrust laws to be construed to permit competitors to aggregate their economic power to coerce favors from government, and then to be immunized by that governmental action when they deny the benefits of competition to consumers.

This important question should be answered by this Court. If Respondents and the court of appeals are correct in their view, and Petitioners submit they are not, then, in fairness to the governmental bodies which may be the targets of such coercive boycotts, this Court should explicitly state that when governmental bodies capitulate to the demands of the boycotters, they are also conferring antitrust immunity on the conspirators. If, on the other hand, Petitioners' views are correct, then this case presents an opportunity for this Court not only to correct a serious error by the court of appeals, but to strengthen the hand of governmental bodies in resisting such coercive boycotts, and to send an explicit message to those who would engage in such conduct that they do so at their peril.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Petition and in the *Amicus Curiae* brief of the State of Maine, the writ of certiorari should be granted.

Respectfully submitted.

SIEGEL, BRILL,
GREUPNER &
DUFFY, P.A.
K. Craig Wildfang
(Counsel of Record)
Wood R. Foster, Jr.
Anne K. Weinhardt
1300 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-7131

OPPERMAN HEINS
& PAQUIN
Vance K. Opperman
Robert J. Schmit
2200 Washington Square
100 Washington Avenue So.
Minneapolis, MN 55401
(612) 339-6900

CURTIS, THAXTER,
STEVENS, BRODER
& MICOLEAU
Sidney St.F. Thaxter
John D. Gleason
One Canal Plaza
Portland, ME 04112
(207) 775-2361

MCTEAGUE, HIGBEE
LIBNER, MACADAM
CASE & WATSON
Patrick N. McTeague
Four Union Park
P.O. Box 5000
Topsham, ME 04086
(207) 725-5581

Barnet D. Skolnik
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(207) 775-2361

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